

University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Copyright 1939, by the University of Pennsylvania

VOLUME 88

NOVEMBER, 1939

No. I

THE TAX DECISIONS OF THE SUPREME COURT, 1938 TERM

CHARLES L. B. LOWNDES †

The volume of tax business transacted before the Supreme Court at the 1938 Term fell off slightly from the average of previous years.¹ There were, however, an exceptional number of cases of outstanding interest. The drastic reconstruction of the Court's personnel was reflected in a surging tide of doctrinal innovation, which the unreconstructed members of that tribunal, intransigent but impotent, were powerless to stem. Sadly they remarked the passing of the ancient landmarks. Landmarks did tumble like tenpins. Congress, even when the star of the present administration was at its zenith, never revised a revenue act with the spirited abandon with which the Court is rewriting the judicial legislation of taxation.

I

THE SCOPE OF THE FEDERAL TAXING POWER

In the verdant days when the New Deal was a new deal, Mr. Justice Roberts decided a case called *United States v. Butler*,² in which he held that the Agricultural Adjustment Act of 1933 was unconstitutional. This was, of course, back in 1936. Three years later, Mr. Justice Roberts delivered the opinion in another case called *Mulford v. Smith*,³ in which he held that the Agricultural Adjustment Act of

† A. B., 1923, Georgetown University; LL. B., 1926, S. J. D., 1931, Harvard University; member of the New York and District of Columbia Bars; Professor of Law at Duke University; author of *The Supreme Court on Taxation, 1936 Term* (1937) 86 U. OF PA. L. REV. 1, 149; *Taxation and the Supreme Court, 1937 Term* (1938) 87 U. OF PA. L. REV. 1, 33, and of other articles in legal periodicals.

1. Excluding orders, memorandum opinions, petitions for certiorari and rehearing, and counting as single cases opinions where several cases were consolidated and disposed of simultaneously, forty-six tax cases were decided at the 1938 Term, as contrasted with fifty-six at the 1937 Term, forty-seven at the 1936 Term, and more than sixty at the 1935 Term.

2. 297 U. S. 1 (1936).

3. 307 U. S. 38 (1939), 87 U. OF PA. L. REV. 1005.

1938, which imposes penalties on the sale of tobacco produced by a tobacco grower in excess of his allotted quota, was constitutional. According to *United States v. Butler*, an agreement to pay a farmer for not raising crops is an unconstitutional attempt on the part of the federal government to control production. *Mulford v. Smith* makes it clear, however, that imposing penalties for marketing tobacco in excess of a prescribed quota is not an attempt to regulate production, but in the words of Mr. Justice Roberts, "solely a regulation of interstate commerce, which it reaches and affects at the throat where tobacco enters the stream of commerce—the marketing warehouse."⁴ Mr. Justice Roberts added that since the 1938 Act simply forbids the sale of tobacco, not its production, it is not an unconstitutional attempt to regulate production.

It is not entirely clear why farmers want to raise tobacco which they cannot sell. Presumably, it is a hobby. This puzzled Mr. Justice Butler, who with Mr. Justice McReynolds dissented. "It is wholly fallacious," he bluntly declared, "to say that the penalty is not imposed upon production. The farmer raises tobacco only for sale. Punishment for selling is the exact equivalent of punishment for raising the tobacco."⁵

Another case at the last term, which makes interesting reading in connection with *Mulford v. Smith*, is *Stahmann v. Vidal*,⁶ where the opinion was also delivered by Mr. Justice Roberts. This involved a suit for a refund of taxes paid under the Bankhead Cotton Act of 1934. The Bankhead Cotton Act of 1934, like the Agricultural Adjustment Act of 1938, was a drastic version of the Agricultural Adjustment Act of 1933. Instead of bribing farmers not to raise cotton, they were granted certain allotments and subjected to penalties on cotton produced over and above these allotments. The Bankhead Act appeared to be such a bald effort to establish federal control over production that it was repealed after the decision in *United States v. Butler*. The penalty taxes under the Bankhead Act were imposed when the excess cotton was ginned and were collected from the ginner. The plaintiffs in *Stahmann v. Vidal* were producers, who had paid penalties in order to secure the release of their excess cotton from the ginner, and the suit was brought to recover these penalties. The district court decided that the Bankhead Act was unconstitutional and that the plaintiffs were entitled to maintain their action. The circuit court of appeals, however, reversed the decision of the district court on the ground that the constitutionality of the Bankhead Act was not in issue because

4. *Id.* at 47.

5. *Id.* at 53.

6. 305 U. S. 61 (1938).

the plaintiffs had paid the ginner's tax, rather than a tax assessed against themselves, and, therefore, had no status to sue for its recovery.⁷ The Supreme Court undertook to review the decision of the circuit court of appeals solely on this point. In reversing the decision of the circuit court of appeals, Mr. Justice Roberts held that the plaintiffs were the proper parties to sue, since the penalties were really assessed against the producers of cotton, rather than the ginner. The decision on this point seems sound enough, but one may wonder whether in view of *Mulford v. Smith* the Bankhead Act really was unconstitutional and the plaintiffs had any grounds of action.

In the last case involving the power of the Federal Government to regulate by indirection in an area where direct action is proscribed, the Court again upheld the constitutionality of the National Firearms Act. In *Sonzinsky v. United States*,⁸ it was held that the National Firearms Act was a valid exercise of the federal taxing power and did not trespass on the powers reserved to the states under the Tenth Amendment. In *United States v. Miller*,⁹ the Court upheld the statute against the charge that it violated the constitutional guaranty of the Second Amendment that "the right of the people to keep and bear arms shall not be infringed." The arm which the defendant desired to bear was a shotgun with a barrel less than eighteen inches long. Mr. Justice McReynolds pointed out that the purpose of the Second Amendment was to provide a well regulated militia. "In the absence of any evidence," said Mr. Justice McReynolds, "tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument."¹⁰ Disclaiming any acquaintance for himself and his brethren with sawed-off shotguns, he added: "Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense."¹¹

II

INTERGOVERNMENTAL IMMUNITIES

*Graves v. New York ex rel. O'Keefe*¹² was one of the new landmarks. The Court, following the lead of *Helvering v. Gerhardt*,¹³

7. 93 F. (2d) 902 (C. C. A. 10th, 1938).

8. 300 U. S. 506 (1937).

9. 307 U. S. 174 (1939). Mr. Justice Douglas did not participate in this decision.

10. *Id.* at 178.

11. *Ibid.*

12. 306 U. S. 466 (1939), decision of New York Court of Appeals noted in 87 U. of Pa. L. REV. 349; *accord*, *State Tax Commission v. Van Cott*, 306 U. S. 511 (1939).

13. 304 U. S. 405 (1938).

swept away the final vestige of intergovernmental immunity of federal and state employees from state and federal income taxation. The immediate problem in issue involved the constitutionality of a New York income tax upon the salary of an employee of the Home Owners' Loan Corporation. Mr. Justice Stone, pursuing the line of reasoning which he adopted in *Helvering v. Gerhardt*, held that the tax was constitutional, since the Court could not assume that a tax upon the salary of a governmental employee would be shifted to the governmental employer. In reaching this decision, Mr. Justice Stone ended a long controversy about the character of the Federal Government's powers when he said that all the constitutional undertakings of the Federal Government are governmental. The activities of the states have been divided traditionally into those which are governmental and tax-exempt, and those which are proprietary and taxable. According to Mr. Justice Stone, however, no such distinction prevails in connection with the undertakings of the national government. "As that Government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action. . . ." ¹⁴ Obviously, the logic of Mr. Justice Stone's dictum is not ineluctable. There is no manifest reason why proprietary, as well as governmental powers, may not have been delegated to the Federal Government. His position, however, has the practical merit of freeing federal activities from the tenuous distinction between governmental and proprietary powers, as well as sharply lighting up the problem in the *O'Keefe* case. Since all the activities of the Federal Government are governmental, the case is a square precedent for the proposition that there is no intergovernmental immunity for the salaries of governmental employees, even when they are engaged in a governmental undertaking.

Mr. Justice Stone also said, however, that Congress might immunize the salaries of its employees from state taxation, although he added enigmatically that whether Congress' power "to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances, extend beyond the constitutional immunity of federal agencies which the courts have implied, is a question which need not now be determined." ¹⁵ The precise bearing of this observation is obscure. In view of the decision in the *O'Keefe* case, there seems to be no constitutional immunity for federal salaries from state taxation. Judicial implications to the contrary appear to have been egregious error. How Congress can extend

14. *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 477 (1939).

15. *Id.* at 478.

such immunity without going beyond the bounds of implied constitutional immunity, is far from clear.

One of the interesting questions suggested by the *O'Keefe* case is the possible bearing of this decision on the immunity of interest from federal and state bonds from state and federal income taxes. Nothing in Mr. Justice Stone's opinion has any necessary relation to the problem. The salaries of governmental employees were held to be taxable, because the tax was upon the employee rather than the governmental employer, and the Court refused to assume that the burden of the tax would be shifted to the employer. Although an income tax on the interest from governmental securities is assessed directly against the bondholder, rather than the borrowing sovereign, it will be much more difficult for the Court to refuse to assume that the burden of such taxes is not passed on to the borrower. There is substantial disagreement as to the precise effect which taxing interest from tax-exempt securities would have—that is, whether the tax would exceed, exactly offset or fall below the sums required for increased interest—but there is substantial agreement that such a tax would necessitate raising the interest rates on governmental borrowings in some degree.

Although little guidance may be gleaned from the majority opinion in *Graves v. New York ex rel. O'Keefe* with respect to the probable attitude of the Court toward taxing the interest from tax-exempt securities, there are some interesting phrases in the concurring opinion of Mr. Justice Frankfurter and the dissenting opinion of Justices Butler and McReynolds. Mr. Justice Frankfurter declared, "All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.'"¹⁶ He also hinted at "an important shift in constitutional doctrine"¹⁷ which may or may not have been the *O'Keefe* case itself, and declared that "The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution."¹⁸ Although he confined himself to invidious generalities without descending to the specific problem of the taxation of interest from tax-exempt securities, Mr. Justice Frankfurter may have indicated the trend of his sympathies. Some color for this notion is found in the statement of the dissenting justices, that it safely "may be said that presently marked for destruction is the doctrine of reciprocal immunity that by

16. *Id.* at 490.

17. *Id.* at 487.

18. *Id.* at 491.

recent decisions here has been so much impaired.”¹⁹ It is perhaps as likely, however, that the dissentient justices were merely expressing a general malaise about Mr. Roosevelt’s reconstructed court, rather than reiterating a definite conviction carried away from the conference room.

III

INTERSTATE COMMERCE

A number of cases at the 1938 Term involved the immunity of interstate commerce from state taxation. Three times, for example, the constitutionality of the California use tax was challenged. In each case, however, the validity of the California legislation was sustained.

The use tax is a supplement to the sales tax, which is designed to circumvent constitutional prohibitions against taxing interstate and extrastate sales by imposing a tax upon the intrastate use and consumption of goods purchased in the course of such sales. The first attack on the use tax before the Supreme Court proceeded upon the theory that the tax was merely an unconstitutional subterfuge for taxing interstate and extrastate sales. This contention was rejected in *Henneford v. Silas Mason Co.*²⁰ which held that the tax was imposed upon the intrastate incidents of use or consumption, rather than upon sale. Two of the cases at the last term attacked a use tax upon this level. In *Southern Pacific Co. v. Gallagher*²¹ and *Pacific Telephone & Telegraph Co. v. Gallagher*,²² the taxpayers purchased materials outside of California and transported them into that state, where they were installed as part of an interstate railroad in one case, and an interstate telegraph and telephone line in the other. It was argued that the application of the California use tax to these transactions violated the commerce clause, as a tax upon the privilege of engaging in interstate commerce, and the due process clause of the Fourteenth Amendment, as a tax upon the extraterritorial use of these materials outside of the state. Writing for the majority in both cases, Mr. Justice Reed rejected these contentions. “The appellant,” he said, in the *Pacific Telephone & Telegraph Co.* case, “exercises two rights of ownership in California—retention and installation—after the termination of the interstate shipment and before the use or consumption on its mixed interstate and intrastate telephone system.”²³ According to Mr. Justice Reed, the tax attaches to these intrastate incidents and is not a tax on the privilege of engaging in interstate commerce. The decision

19. *Id.* at 493.

20. 300 U. S. 577 (1937).

21. 306 U. S. 167 (1939).

22. 306 U. S. 182 (1939).

23. *Id.* at 187.

of the majority on the commerce point automatically foreclosed any objection to the tax on the score of due process. Since the tax was on the purely intrastate incidents of retention and installation, there could be no question of a tax upon the extraterritorial use of the property.

Mr. Justice Roberts did not participate in either of these decisions, while Justices McReynolds and Butler dissented. With reference to the decision in the *Southern Pacific Co.* case, Mr. Justice McReynolds said: "The facts stated in the opinion just announced leave nothing of substance to support its conclusion that the California tax is not upon the operation—maintenance and use—of appellant's railroad for interstate transportation."²⁴ Strangely enough, however, neither Mr. Justice McReynolds nor Mr. Justice Butler dissented in the case of *Nashville, C. & St. L. Ry. v. Wallace*,²⁵ whose facts appear to closely approximate those of the principal cases. There, an interstate railroad company purchased gasoline outside of Tennessee and transported it into that state, where it was used to generate power for the operation of its interstate railroad. The Court held that the railroad was constitutionally subject to a Tennessee tax on storing the gas.

The third case involving the California use tax sustained a solution for a difficult administrative problem in connection with the tax. It is no easier to collect a use tax from the consumer than it is to collect a sales tax from the buyer. The only satisfactory administrative procedure in either case is to make the seller the collecting agent for the tax. The California statute provides, therefore, that retailers who maintain a place of business in the state and sell goods for use or consumption there, are responsible for the collection of the use tax. In *Felt & Tarrant Mfg. Co. v. Gallagher*,²⁶ an Illinois corporation, which was selling comptometers to purchasers in California, challenged the validity of this provision. The seller did no intrastate business in California. Sales were made through the medium of two solicitors maintained there by the corporation, who took orders and transmitted them for acceptance to the seller's home office. When these orders were accepted, they were filled by shipping the comptometers to the purchasers in California from points outside the state. The Felt & Tarrant Mfg. Co. contended that the statute compelling it to act as collecting agent for the use tax in connection with these transactions, violated both the commerce clause and the due process clause of the Fourteenth Amendment. The Court dismissed these objections summarily, declaring that the tax was not a tax upon interstate commerce but upon the privilege of use after such commerce is at an end, and

24. *Southern Pacific Co. v. Gallagher*, 306 U. S. 167, 181 (1939).

25. 288 U. S. 249 (1933).

26. 306 U. S. 62 (1939).

there was nothing unconstitutional in requiring the seller to act as the collecting agent of the state for the tax. The decision does not, of course, touch the problem of whether an extrastate seller, who does not even maintain solicitors in the taxing state, can be required to account to that state for its use tax.

At the 1937 term the Supreme Court invented, or, in terms of the more courteous fiction, discovered, a new test to determine the validity of a state tax upon gross receipts from interstate commerce.²⁷ Does the tax present possibilities of multiple taxation? If it does, it is invalid. If it does not, it is valid. This test was invoked in an interesting decision at the 1938 term.²⁸ Gwin, White & Prince, Inc., were engaged in marketing fruit for fruit growers and fruit growers' co-operative associations. The fruit was received in Washington and Oregon, and shipped to other states, where it was sold. The gross receipts from this business were subjected to a Washington "business activities" privilege tax, although the Washington tax authorities excluded receipts referable to services connected with marketing fruit from Oregon. Mr. Justice Stone held that the Washington tax was unconstitutional. He said that not every state tax measured by gross receipts from interstate commerce was unconstitutional, but that to be valid such a tax must be so limited as to preclude the possibility of multiple taxation. "But it is enough for present purposes", said Mr. Justice Stone, "that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to activities carried on within the state . . . burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."²⁹

Justices Butler and McReynolds concurred in the result, apparently withholding their full acquiescence because they felt that any tax measured by gross receipts from interstate commerce imposed an unconstitutional burden on such commerce.

Mr. Justice Black dissented at length. He pointed out that by denying Washington power to levy the tax because of possible future

27. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938); see Lowndes, *Taxation and the Supreme Court* (1938) 87 U. OF PA. L. REV. 1, 15-20.

28. *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

29. *Id.* at 438.

multiple taxation, the Court was creating an immunity for interstate, at the expense of intrastate, commerce. He felt that Congress should determine whether such a tax was invalid and that "nondiscriminatory" state taxes on interstate commerce were to be upheld in the absence of Congressional prohibition. Mr. Justice Black concluded that the apportionment rule suggested by the majority opinion as the test of validity of taxes measured by gross receipts was in itself an attempt to regulate commerce, which, under the Constitution and as a matter of functional efficacy, was a power which could only properly be exercised by Congress.

There were a number of cases involving the distinction between a fee and a tax. In *Dixie Ohio Express Co. v. State Revenue Commission*³⁰ a Georgia tax upon vehicles used by an interstate trucker was held to be a reasonable fee for using the Georgia highways rather than a tax on the privilege of engaging in interstate commerce, although the proceeds of the tax were expended for the upkeep of roads over which the trucker was not authorized to operate by the Interstate Commerce Commission. The Court said that since the tariffs on the vehicles in question merely represented reasonable compensation for the use of the state's highways, the disposition which was made of the proceeds was immaterial. The Court also found that there was no denial of equal protection in the imposition of higher tariffs on vehicles used to transport for hire and vehicles not engaged in commercial trucking. This was not an unreasonable classification.

Clark v. Paul Gray, Inc.,³¹ raised a somewhat similar problem in connection with a tax on "caravaning" imposed by California. The attack on the California statute like that levelled at the Georgia Act was on the basis of the commerce and equal protection clauses. "Caravaning" was defined by the statute as driving or towing cars in the state for the purpose of sale within or without the state. Every vehicle falling within this description was subject to two license fees of \$7.50 each, one of which, the statute recited, was to reimburse the state for the cost of policing this type of traffic, and the other of which was to compensate for the use of the state's highways. No similar fees were exacted from cars either driven singly or towed entirely within certain zones. Although the amount of the fees was the same as had been held to be unreasonable in an earlier case,³² invalidating a somewhat similar California statute, the Court in *Clark v. Paul Gray Co.* held that the fees must be deemed merely compensatory, since,

30. 306 U. S. 72 (1939).

31. 306 U. S. 583 (1939).

32. *Ingels v. Morf*, 300 U. S. 290 (1937); cf. *Morf v. Bingaman*, 298 U. S. 407 (1936).

unlike the earlier case, it had not been established that they were not a reasonable recompense for the wear and tear on the highways and the cost of policing this kind of traffic. With respect to the equal protection point, the Court refused to consider an alleged discrimination arising from the fact that single cars driven entirely within certain prescribed zones, or driven into the state for purposes other than sale, were not taxed, while single cars, driven for sale, whose movement was not restricted to one of these zones were. The appellant did not bring any single cars into the state and such discrimination, therefore, even if it existed, did not affect it. Regarding the discrimination between cars which were towed intrazone and cars towed in the state whose movement was not restricted to one of the exempt zones, the Court found that this did not create an unreasonable classification. The intrazone movement was largely confined to short hauls in metropolitan areas over wide roads and did not create the same traffic hazards or cause the same wear and tear on the highways, as caravans moving into the state from outside points, which involved long hauls over narrow mountainous roadways.

In his initial tax opinion, Mr. Justice Frankfurter, speaking for a unanimous court in *Hale v. Bimco Trading, Inc.*,³³ held that a Florida statute did not impose a constitutional inspection fee, but a discriminatory tax against foreign commerce. The Florida law assessed an inspection fee of fifteen cents per hundred pounds against cement imported into that state from foreign countries. Pointing out that the alleged fee was sixty times the cost of inspection and that Florida cement and cement from other states were not required to undergo inspection at all, Mr. Justice Frankfurter concluded that the purpose of the statute was not to insure that only safe cement should be used in the state, but, as the statute itself recited, to prevent foreign competition with the Florida cement industry. "It would not be easy to imagine", said Mr. Justice Frankfurter, "a statute more clearly designed than the present to circumvent what the Commerce Clause forbids."³⁴

The remaining commerce cases raised no issues of large doctrinal significance. *J. Bacon & Sons v. Martin*³⁵ involved a Kentucky tax on the "receipt" of cosmetics in the state by any Kentucky retailer. The Kentucky Court of Appeals, in upholding the constitutionality of the statute, construed "receipt" as synonymous with "sale and use" of cosmetics in the state by the retailer. Accepting this construction as

33. 306 U. S. 375 (1939).

34. *Id.* at 380.

35. 305 U. S. 380 (1939).

binding upon it, the United States Supreme Court held that the tax did not impose an unconstitutional burden on interstate commerce.

*James v. United Artists Corp.*³⁶ also turned upon the construction of a state statute. In the absence of a construction by the state courts, the Supreme Court had to determine whether a West Virginia tax measured by the gross receipts of "every person engaging . . . within this state in the business of collecting incomes from the use of real or personal property" was properly descriptive of the plaintiff's activities. The plaintiff was United Artists Corporation, a Delaware company, which leased films to exhibitors in West Virginia in return for a percentage of their gross receipts. United Artists had no office in West Virginia. The leases were effected through the medium of solicitors, who were sent into the state to obtain the exhibitors' applications for films, which were forwarded to United Artists' New York office for acceptance or rejection. Payments for the use of the films were made by remittances sent by the exhibitors to the lessor outside of West Virginia. Some of the exhibitors' contracts carried clauses to the effect that the lessor's share of gross receipts was to be segregated daily by the exhibitor and held in trust for the lessor. These receipts were, however, remitted to United Artists outside West Virginia in the same manner as the payments under the contracts which were free from this provision. The Court found that United Artists was not engaged in the business of collecting income within West Virginia and did not fall within the tenor of the West Virginia tax. Mr. Justice Stone, who delivered the opinion, added: "The contract requirement that the exhibitor is to set apart the appellee's percentage of gross receipts 'in trust' is a familiar device for securing payment to the appellee in the event of the exhibitor's financial embarrassment. But it does not make the exhibitor appellee's agent, nor does it dispense in law, more than it has in fact, with the performance of the former's obligation to make all payments to appellee without the state."³⁷ The lower court seems to have found, both, that the West Virginia tax did not apply to the appellee, and that, if it did apply, it would impose an unconstitutional burden upon it. The Supreme Court, however, contented itself with affirming the decision on the more limited ground that properly construed the statute had no application to the appellee's activities, without any attempt to review the constitutional issue.

The last commerce decision³⁸ involved a territorial tax by Hawaii which was measured by a percentage of gross income of a steamship

36. 305 U. S. 410 (1939).

37. *Id.* at 415.

38. *Inter-Island Steam Navigation Co. v. Territory of Hawaii*, 305 U. S. 306 (1938).

company, a large part of whose business consisted of carrying freight destined for trans-shipment to the states and foreign ports. The proceeds of the tax were used to support a commission designed to regulate utilities in the territory. The steamship company attacked the tax as an unconstitutional burden on interstate and foreign commerce and a violation of the due process clause of the Fifth Amendment. The Court said that the tax did not violate the commerce clause because Congress had subjected the petitioner to the territorial law under which the tax was levied and, consequently, had sanctioned any resultant burden on interstate and foreign commerce. On the due process point the steamship company contended that it had been deprived of property without due process of law because it was taxed for the support of a commission which had never investigated or regulated it. This was held to be immaterial. "A general tax", said Mr. Justice Black in denying that there was any deprivation of due process, "designed to effectuate a plan for control and supervision of public utilities need not be apportioned among the taxpayers according to the actual services performed directly for each. Such a requirement would seriously impair the effective application and operation of general tax systems."³⁹

IV

JURISDICTION TO TAX

The beginning of the current decade found the Supreme Court turning its collective back on the orthodox proposition that nothing in the Fourteenth Amendment forbids double taxation of intangible personalty. Against the opposition of the "liberal" minority of the day, it was held in a series of cases commencing with *Safe Deposit & Trust Co. v. Virginia*⁴⁰ and culminating with the decision in *First National Bank v. Maine*,⁴¹ that multiple taxation of intangible personalty, like a double tax on land or tangible chattels, offended the due process clause of the Fourteenth Amendment. Recently, however, the Court has been discreetly retreating from that position.⁴² At the 1938 term discretion was cast aside; retreat became rout.

There was nothing particularly noteworthy about the first case on jurisdiction to tax. *Guaranty Trust Co. v. Virginia*⁴³ held that a Virginia beneficiary of a discretionary New York trust might be taxed by Virginia upon the income received from the trustee which had also

39. *Id.* at 314.

40. 280 U. S. 83 (1929). The other cases so holding are *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204 (1930); *Baldwin v. Missouri*, 281 U. S. 586 (1930); *Beidler v. South Carolina Tax Commission*, 282 U. S. 1 (1930).

41. 284 U. S. 312 (1932).

42. *Schuykill Trust Co. v. Pennsylvania*, 302 U. S. 506 (1938), 86 U. OF PA. L. REV. 556; see also *First Bank Stock Corporation v. Minnesota*, 301 U. S. 234 (1937).

43. 305 U. S. 19 (1938), (1939) 87 U. OF PA. L. REV. 356.

paid a tax to New York. The prohibition against double taxation has never been extended to the taxation of income. The decision in the *Guaranty Trust Co.* case was in line with cases like *Lawrence v. State Tax Commission*⁴⁴ and *New York ex rel. Cohn v. Graves*,⁴⁵ both of which were cited by Mr. Justice McReynolds, an aggressive antagonist of multiple taxation, who delivered the opinion in the *Guaranty Trust Co.* case. Mr. Justice McReynolds, however, did not cite *Maguire v. Trefry*,⁴⁶ the precedent probably closest in point. This may have been due to some embarrassment arising out of the aspersions cast upon the *Trefry* case by *Senior v. Braden*.⁴⁷ There can be little doubt, however, that *Maguire v. Trefry* fairly reflects the current temper of the Court in view of the decision in the *Guaranty Trust Co.* case and the later decisions at the 1938 term.

The exciting developments in connection with jurisdictions to tax came in the closing days of the 1938 term with the decision of a group of three cases. In the first of these, *Curry v. McCanless*,⁴⁸ a Tennessee decedent during her lifetime had established an irrevocable trust of intangible personalty with an Alabama trustee. The documentary evidences of the intangibles were kept in Alabama and the trust was administered there. At her death, the decedent, who had reserved a right to the income from the trust during her life and a power to dispose of the remainders by her will, exercised this power. This action was instituted in the Chancery Court in Tennessee for a declaratory judgment to determine who could subject the trust to a death tax. The Chancery Court held that Alabama alone had jurisdiction to tax. The Tennessee Supreme Court, however, reversed the lower court's decision and held that only Tennessee could tax. An appeal was prosecuted to the United States Supreme Court which held, with Mr. Justice Stone writing the majority opinion, that both Alabama and Tennessee had jurisdiction to tax. Mr. Justice Stone repudiated the doctrine that the Fourteenth Amendment forbids double taxation of intangibles. He declared that the relation between the decedent and Tennessee, her domicil, justified a tax by that state, while Alabama was free to tax because of the relation which it sustained to the trust itself. Mr. Justice Reed concurred in Mr. Justice Stone's opinion with the limitation that he reserved his concurrence in a statement to the effect that "taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does

44. 286 U. S. 276 (1932).

45. 300 U. S. 308 (1937), 85 U. OF PA. L. REV. 645.

46. 253 U. S. 12 (1920).

47. 295 U. S. 422 (1935).

48. 307 U. S. 357 (1939).

not preclude the state of incorporation from imposing a tax measured by all its intangibles." ⁴⁹ Mr. Justice Butler dissented. The Chief Justice, Mr. Justice McReynolds, and Mr. Justice Roberts concurred in this dissent.

Graves v. Elliott ⁵⁰ involved substantially the same point as *Curry v. McCanless*. The decedent, while domiciled in Colorado, had created a revocable trust of intangible personalty with a Colorado trustee. The documentary evidences of the intangibles were kept in Colorado, where the trust was administered. Prior to her death, the decedent moved to New York where she was domiciled at her death. Colorado imposed a death tax upon the trust. New York assessed a similar tax. The Supreme Court sustained the New York tax. Mr. Justice Stone delivered the majority opinion basing his conclusion upon the *McCanless* case. The Chief Justice spoke for the dissenters in a vain plea to the effect that intangibles should be assimilated to tangibles for purposes of jurisdiction to tax, and their taxation restricted to a single state.

The last case in this group was *Newark Fire Insurance Co. v. State Board of Tax Appeals*,⁵¹ where there were two concurring opinions, in each of which four of the justices participated. Mr. Justice McReynolds is not listed with either group; nor is the fact that he did not participate in the decision noted. The tax in issue was a New Jersey tax upon the paid-in capital stock and accumulated surplus of a New Jersey corporation which maintained its general office and kept its securities and the bulk of its cash in New York. Although the New Jersey courts treated the tax as a property tax, they held that New Jersey had power to impose such a tax, even though the company's intangibles had acquired a business situs in New York. The opinion delivered by Mr. Justice Reed, in which the Chief Justice, Mr. Justice Butler and Mr. Justice Roberts concurred, sustained the tax, declaring that it was not necessary to decide whether it was a property tax or not, nor, if it was, whether the fact that the company's intangibles had a business situs independent of the corporate domicile would prevent a tax by the corporate domicile. Mr. Justice Reed pointed out that there is a presumption that intangibles of a corporation may be taxed by the state of incorporation, and that since the company had failed to establish an independent business situs for these intangibles, there was nothing in the case to rebut this presumption. Mr. Justice Frankfurter delivered a concurring opinion in which he spoke for himself and Justices Stone, Black and Douglas. The gist of Mr. Justice

49. *Id.* at 374.

50. 307 U. S. 383 (1939).

51. 307 U. S. 313 (1939).

Frankfurter's opinion seems to be that the corporate domicile may tax a corporation's intangibles, regardless of the existence of an independent business situs elsewhere.

Since the famous *Dorrance* cases⁵² taxpayers have been unpleasantly aware of another kind of multiple taxation, one based upon multiple domicils rather than multiple situs. *Texas v. Florida*⁵³ was an interesting decision involving this problem, which appears to have generated more heat than light. When Colonel Edward Green died, he left a large estate the bulk of which consisted of intangible personalty. A number of states asserted the right to tax these intangibles upon the theory that the decedent had been domiciled there at the time of his death. One of these states was Texas. On the assumption that Colonel Green was domiciled in Texas when he died, the assets of his estate located there were insufficient to defray the Texas tax. Texas, therefore, filed an original bill in the Supreme Court against the other states which claimed Colonel Green as a domiciliary to determine his true domicile. The Supreme Court consented to review the question, although this ultimately proved rather thin consolation for Texas, since the decedent was found to have been domiciled at the time of his death in Massachusetts. Of particular interest, of course, is the Court's assumption of jurisdiction. While on the surface this may appear to be the solution for the problem of double domicile, closer scrutiny reveals that such optimism is totally unwarranted. Mr. Justice Frankfurter was in flat disagreement with the majority of the Court and felt that they should have refused jurisdiction. Mr. Justice Black concurred with Mr. Justice Frankfurter. The majority opinion itself is carefully limited to the unique circumstances of the case. Mr. Justice Stone stressed the fact that there were not enough assets in Texas to meet the Texas tax and held that the protection of Texas' interests in this respect made out a "case or controversy" within the original jurisdiction of the Court, since the bill was in the nature of a bill of interpleader. Apparently, if the estate had been distributed among the contesting states in such proportions that each one could have satisfied its claim, regardless of the merits of that claim, recourse to the Supreme Court would not have been tolerated. The decision is, therefore, very limited. The taxpayer, who is the one most keenly interested in an authoritative adjudication of domicile, cannot initiate proceedings for a judicial determination of this question in any forum

52. *Dorrance v. Thayer-Martin*, 116 N. J. Eq. 204, 172 Atl. 503 (1934), cert. denied, 298 U. S. 678 (1935); *Dorrance's Estate*, 399 Pa. 151, 163 Atl. 303 (1932), cert. denied sub nom., *Dorrance v. Pennsylvania*, 287 U. S. 660 (1932). See Ohlander, *Double Inheritance Taxation* (1936) 14 TAX MAG. 387, 390, 448, for a concise history of this litigation.

53. 306 U. S. 398 (1939).

except a tribunal of one of the partisan states.⁵⁴ Nor may such proceedings be instituted by an interested state sovereign, unless the funds of the estate within its borders are insufficient to satisfy its claim.

Double domicile presents a perplexing problem. *Texas v. Florida* may be a step in the right direction, but it is a short and timid step moving in a narrow range, which manifests a curious indifference to individual injustice. It scarcely seems consistent with the even-handed impartiality which may be rightfully demanded of the Supreme Court, to find that tribunal willing to adjudicate domicile, as it was in *Texas v. Florida*, where this is necessary to insure collection of a tax; but grimly refusing to make a similar adjudication, where this will prevent confiscation of an individual's estate by unfounded tax claims.⁵⁵

V

RETROACTIVE TAXATION

An interesting question in connection with a retroactive state income tax arose in *Welch v. Henry*.⁵⁶ Under the Wisconsin income tax as it stood in 1933, dividends from corporations whose "principal business" was "attributable to Wisconsin," were deductible from gross income. In 1935 the Wisconsin legislature passed an act taxing these dividends, which had been received in 1933. The rates of the dividend tax differed from those at which income was taxed under the law in force in 1933; moreover, the deductions permitted in computing net income in 1933 could not be taken against the dividend tax, and there was a lower exemption. A taxpayer who had received exempt dividends in 1933 contested the constitutionality of the 1935 Act on the grounds that it violated the equal protection and due process clauses of the Fourteenth Amendment. The Supreme Court, however, sustained the Wisconsin legislation. Mr. Justice Stone, writing for the majority, started with the premise that the retroactive operation of the 1935 Act had no bearing upon the question of equal protection. Since separate tax treatment of dividends would have constituted a reasonable classification in a prospective tax, he found that there had been no denial of equal protection by the Wisconsin law. Mr. Justice Stone then turned to the problem of retroactivity which he had isolated as a question of due process. In the past, he said, the Supreme Court had found certain retroactive taxes, such as gift taxes, unconstitutional because it seemed unfair to allow a taxpayer to complete a voluntary transaction without imposing a tax, and then to levy a tax on this

54. *Worcester County Trust Co. v. Riley*, 302 U. S. 292 (1937); *Nevin v. Martin*, 22 F. Supp. 836 (D. N. J. 1938), *aff'd*, 59 Sup. Ct. 1046 (1939).

55. There can be no question but that it is feasible for the Supreme Court to adjudicate a question of double domicile. It did so in *Texas v. Florida*.

56. 305 U. S. 134 (1938).

transaction, which could not have been reasonably anticipated when it was undertaken. An income tax, however, he continued, unlike a gift tax, is not imposed upon a voluntary act in the sense that taxpayers might refuse to receive income because of such a tax. The only question in connection with the Wisconsin tax was "the particular inconvenience of the taxpayer in being called upon, after the customary time for levy and payment of the tax has passed, to bear a governmental burden of which it is said he had no warning and which he did not anticipate."⁵⁷ The test of the validity of such a tax according to the majority opinion seems to be how far back the legislature reaches in imposing the tax. "Assuming," said Mr. Justice Stone, "that a tax may attempt to reach events so far in the past as to render that objection valid, we think that no such case is presented here."⁵⁸ The reason he felt that the tax had not gone back too far was that the Wisconsin legislature only meets in odd numbered years. Consequently, the 1935 tax was passed at the next regular session of the legislature after the 1933 income tax returns, which were due in 1934, were filed.

Mr. Justice Roberts wrote a dissenting opinion in which Justices McReynolds and Butler concurred. He refused to accept the approach of the majority and to consider the question of equal protection without regard to the retroactive effect of the 1935 Act. Declaring that this was a necessary component of the classification created by that statute, he found that an unreasonable classification had been set up which violated the guarantee of equal protection.

Welch v. Henry does not shed a great deal of light on the constitutionality of a retroactive income tax. Mr. Justice Stone and Mr. Justice Roberts would agree that reasonable retroactivity is permissible. They differed sharply, however, in their opinions as to what was reasonable. The logic of Mr. Justice Stone's opinion is difficult to decipher. If reasonableness in this connection is synonymous with lack of undue hardship on the taxpayer, it is far from apparent why it is less onerous to tax income accruing two years before the enactment of the taxing act than, say, ten years before. According to Mr. Justice Stone there is, however, some outside temporal limit beyond which a legislature must not go. The only time that a taxpayer can reasonably anticipate and arrange for a tax upon his income is prior to the date when his return is filed and the tax is due. At most this will be a few months after the close of the taxable year. If a statute is passed in 1939 taxing income earned in 1937, this might cause greater hardship than a statute passed in 1939 taxing income earned in 1917. It would

57. *Id.* at 148.

58. *Ibid.*

really depend upon whether the taxpayer had a larger income in 1917 or 1937. As long as the statute is passed after the close of the taxable period and the filing of the return for that period, the distance into the past which the legislation goes is irrelevant as far as hardship on the taxpayer is concerned.

VI

THE FEDERAL INCOME TAX

(a) *Income*

The federal income tax continues to top the tax agenda of the Court. At the 1938 term nearly half of the tax opinions fell within this field. Several of these cases were of outstanding importance, not alone for their immediate bearing upon the taxation of income, but for their contributions to general constitutional philosophy.

Earlier reference has been made to the *O'Keefe* case,⁵⁹ which held explicitly that salaries of federal officeholders are subject to state income taxes, and by inference, that the stipends of state officials are taxable under the federal income tax. Another less widespread type of official tax immunity was also proscribed at the last term. By an obvious misapprehension of the constitutional guaranty against reducing the salaries of federal judges of constitutional courts during their terms of office, the Supreme Court held at one time that these officers were immune from the federal income tax.⁶⁰ The result was an undesirable discrimination in favor of a small hierarchy of upper-bracket officeholders, which was generally condemned. In an attempt partially to repair the damage wrought by these decisions, Congress in the 1932 and subsequent Revenue Acts provided that judges appointed after the effective date of the 1932 Act should be subject to the federal income tax. This was, furthermore, explicitly provided to be an amendment to the statutes fixing the compensation of these judges in an attempt to present the tax as a reduction of the salary at which these judges were appointed, rather than a diminution of their stipends after appointment. As matters have turned out this precaution was needless. In *O'Malley v. Woodrough*,⁶¹ the Court, with Justices Butler and McReynolds dissenting, held that a federal tax upon the income of federal judges was constitutional. Although not called upon to pass directly upon the point, Mr. Justice Frankfurter, writing for the majority, left little room for doubt that the federal income tax may be constitutionally applied to the salary of a judge appointed prior to the passage of a tax on judicial salaries, as well as

59. See *supra* p. 3.

60. *Evans v. Gore*, 253 U. S. 245 (1920); *Miles v. Graham*, 268 U. S. 501 (1925).

61. 307 U. S. 277 (1939).

one appointed thereafter. The reasoning of *O'Malley v. Woodrough* is frankly in opposition to *Evans v. Gore*⁶² as well as *Miles v. Graham*.⁶³ As Mr. Justice Holmes pointed out in his dissenting opinion in *Evans v. Gore*, the constitutional prohibition against reducing judicial stipends was designed solely to insure independence of judicial action, not to create a privileged caste of federal officeholders, immune from the normal incidents of citizenship. It is, of course, unthinkable that Congress would undertake to control judicial conduct through the medium of a general income tax, and a complete perversion of the constitutional guarantee to exempt judicial salaries on this score.

For a long time the taxation of improvements made by a lessee as income of the lessor, has presented a vexing problem. At first the Treasury ruled that such improvements constituted income to the lessor when the lease terminated.⁶⁴ Several lower court decisions,⁶⁵ however, challenged this position on the ground that title to the improvements passed to the lessor upon their erection, and therefore, any income realized by the lessor upon this score was realized at that point. To conform to this point of view the Treasury amended its regulations and provided that income should be realized by a lessor from a lessee's improvements at the date these improvements were made.⁶⁶ Doubt was cast upon this proposition, however, by an opinion by Judge Learned Hand, which held that income could not be realized by the lessor until the leased premises were sold at an enhanced price due to the improvements.⁶⁷ While Judge Hand's view never proved acceptable to the Treasury, it was followed by some of the lower federal courts,⁶⁸ with the result that there has been an irritating and constantly widening breach between the Treasury and the courts upon this point. In *M. E. Blatt Co. v. United States*⁶⁹ this question was finally raised before the Supreme Court. Unfortunately, however, although the Government asked the Court to rule whether income was realized (1) at the date when the improvements were completed, (2) when the lease was terminated, or (3) when the leased premises were sold, the case went off on the ground that the Government had failed

62. 253 U. S. 245 (1920).

63. 268 U. S. 501 (1925).

64. U. S. Treas. Reg. 33 (Rev. ed.), Art. 4, ¶ 50.

65. *Miller v. Gearin*, 258 Fed. 225 (C. C. A. 9th, 1919), cert. denied, 250 U. S. 667 (1919); *Cryan v. Wardell*, 263 Fed. 248 (N. D. Cal. 1920).

66. T. D. 3062, 3 CUM. BULL. 109 (1920); Mim. 2714, 4 CUM. BULL. 90 (1921); U. S. Treas. Reg. 45 (1920 ed.) Art. 48.

67. *Hewitt Realty Co. v. Commissioner*, 76 F. (2d) 880 (C. C. A. 2d, 1935).

68. *Hilgenberg v. United States*, 21 F. Supp. 453 (D. Md. 1937); *Staples v. United States*, 21 F. Supp. 737 (E. D. Pa. 1937); *English v. Bitgood*, 21 F. Supp. 641 (D. Conn. 1938); *Dominick v. United States*, 24 F. Supp. 829 (S. D. N. Y. 1938). But cf. *M. E. Blatt Co. v. United States*, 23 F. Supp. 461 (Ct. Cl. 1938).

69. 305 U. S. 267 (1938).

to establish that the improvements resulted in any gain to the lessor or any income. The Commissioner had assessed a deficiency against the lessor upon the theory that improvements made by the lessee resulted in income to the lessor at the time these improvements were made. The amount of this income was computed by taking the cost of the improvements less depreciation to the end of the term. The Court found, however, that the Commissioner had failed to establish that the improvements resulted in any increase in value to the leased premises. It is, of course, quite conceivable that a lessee may make improvements to suit his own situation, which do not enhance the value of the leased property. The Court held that the Commissioner had not shown that these improvements did add to the value of the leased premises and refused to sustain the deficiency. By way of dictum, Mr. Justice Butler added that no income is realized by a lessor at the date when improvements are completed. Although Mr. Justice Stone concurred in the result reached by Mr. Justice Butler, he withheld his concurrence from this proposition.

It has been rather generally assumed that the dictum in the Court's opinion to the effect that income is not realized by a lessor when the improvements made by a lessee are completed is an affirmation of Judge Hand's position in the *Hewitt Realty Co.* case.⁷⁰ This does not necessarily follow. It is quite consistent with the early position of the Treasury that income is realized by the lessor when the lease terminates, which would appear to be the preferable view. Taxing the lessee's improvements to the lessor, as income realized at the date of completion, involves a more or less speculative assessment. The normal method of returning income on this basis is to estimate the depreciated value of the improvements at the termination of the lease and to return that amount, either in a lump sum or pro-rated over the remainder of the lease.⁷¹ Where the lease, however, contains an option for renewal, it is impossible to estimate the value of the improvements at the termination of the lease because there is no method of ascertaining when the lease will end.⁷² Moreover, this system involves some complex readjustments if the lease is forfeited, or otherwise expires, before its natural termination.

Judge Hand's theory that no income is realized until the leased premises are sold, apart from a curious distinction between detachable

70. *Hewitt Realty Co. v. Commissioner*, 76 F. (2d) 880 (C. C. A. 2d, 1935). Although the Treasury has not changed its regulations, U. S. Treas. Reg. 101, Art. 22 (a)-13, in view of the decision in *M. E. Blatt Co. v. United States*, 305 U. S. 267 (1938), the Board of Tax Appeals interprets that decision as an affirmation of Judge Hand's position in the *Hewitt Realty Co.* case. *Cleveland Trust Co.*, 39 B. T. A., Jan. 17, 1939; *Merka Holding Co., Inc.*, 39 B. T. A., Jan. 17, 1939.

71. U. S. Treas. Reg. 101, Art. 22 (a)-13.

72. This was the situation in *Hewitt Realty Co. v. Commissioner*, 76 F. (2d) 880 (C. C. A. 2d, 1935).

and non-detachable improvements, is essentially simple from an administrative viewpoint. The income of the lessor in this situation will be computed by taking the difference between the basis of the property and the selling price, when it is sold. The fact that improvements have been added by a lessee requires no special computations. This theory, however, appears to work an unwarranted hardship on the government by unduly postponing the realization of income past the point where the lessor has actually come into possession and enjoyment of the improvements. It is true that a tax imposed upon the termination of the lease, involves an estimate of the value which the improvements contribute to the property. This is not as clear and definite as the price for which the leased premises may ultimately be sold. However, the quality of the administrative judgment required in this situation does not differ essentially from the appraisal which must be made in the case of improved real estate for purposes of a property tax, or the estimate of the value of improvements which is made in computing the allowance for depreciation.

It is quite possible, moreover, that the leased premises may never be sold, or sale may be postponed until the lessee's improvements have become quite valueless. In such situations the lessor will have enjoyed the benefit of the improvements without paying any tax, if Judge Hand's theory is adopted. It is true that if the premises are re-leased, the lessor may obtain a higher rental due to the lessee's improvements, which will be subject to the income tax. This higher rental, however, does not represent the gain from the improvements themselves. If, for example, a lawyer receives a house and lot in payment for certain services and proceeds to lease the house, it certainly would not be contended that the tax upon this rental compensates for the tax upon the income which he realized upon the acquisition of the house and lot. If the lessor is not taxed upon the improvements themselves, as income—and if the tax is postponed until the sale of the improved premises, he may not be—it is manifest that he has acquired income which has escaped tax.

The difficulty in determining when income is realized by a lessor from a lessee's improvements springs from the fact that we lack a clear concept of realization. The authorities commonly cited in conjunction with Judge Hand's view that no income is realized by a lessor from a lessee's improvements until the leased premises are sold, are the stock dividend cases,⁷³ which hold that no income is realized from

73. For example, Mr. Justice Butler in *M. E. Blatt Co. v. United States*, 305 U. S. 267 (1938) cites, in support of the proposition that the improvements made by the lessee were "an addition to capital; not income within the meaning of the statute", *United States v. Phellis*, 257 U. S. 156 (1921) and *Koshland v. Helvering*, 298 U. S. 441 (1936) among other cases.

a stock dividend in certain situations. There is no real parallel between these situations. The stock dividend cases go on the theory that the taxpayer has received no new interest. It requires an incredible legal myopia to say that no new interest is conferred upon a person when a building or some similar improvement is erected upon his land. One need not speculate about a new interest here; he can actually lay his hands upon it. The erection of a building is totally dissimilar from the bookkeeping transaction which marks the capitalization of surplus and the issuance of a stock dividend. If any one other than the lessee improved another's land, it would certainly not be contended that the landowner had not acquired a "new" interest. If, for example, a contractor builds a house upon a doctor's land in return for medical services, no one would contend that the doctor had not been paid for his services, or had failed to realize income.

The cases where it has been held that no income is realized, which are really parallel to improvements by a lessee, are those in which it has been decided that no income was realized when property was exchanged for something which had no fair market value.⁷⁴ The reason that income is not realized under these circumstances is not the absence of a new interest, but the administrative difficulties inherent in any determination of the amount of income which has been realized. A fair corollary of this doctrine, however, is that income is realized as soon as it is practicable to ascertain the value of the property received on the exchange.⁷⁵ Applying the proper analogy, it would appear that although no income might be realized when the improvements are completed by a lessee, because of the uncertainty implicit in any estimate of the amount of gain at that point, income will be realized when the lease terminates and it is possible to make a reasonable administrative determination of the then worth of the improvements. The *Blatt* case is not inconsistent with this position, and until the Supreme Court commits itself more definitely there is no reason to assume that it has affirmed Judge Hand's position.

Helvering v. R. J. Reynolds Tobacco Co.,⁷⁶ together with a similar decision in *First Chold Corporation v. Commissioner*,⁷⁷ illustrates an unhappy situation which frequently occurs in the cases dealing with the federal tax laws. Under the present system for handling tax problems, it is impossible for the courts to keep abreast of current legislative developments. Whether a central tax court would ma-

74. *Burnet v. Logan*, 283 U. S. 404 (1931); *Helvering v. Tex-Penn Oil Co.*, 300 U. S. 481 (1937).

75. *Cf. Burnet v. Logan*, 283 U. S. 404 (1931).

76. 306 U. S. 110 (1939).

77. 306 U. S. 117 (1939).

terially expedite matters is perhaps arguable, but no one can be oblivious to the gap between legislative enactment and judicial clarification under our present procedures. In some instances this lag is so pronounced that in passing upon a point in connection with a superseded act, the Court generates fresh confusion with respect to the existing law. *Helvering v. R. J. Reynolds Tobacco Co.*, for example, involved the question of the taxability of gains by the Reynolds Company accruing from the purchase and resale of its own stock. Prior to 1934 the Treasury regulations treated a gain of this kind as an accretion to capital. In 1934, however, the regulations were amended to provide that such gains should be taxable as income. The Court held that the gains made by the Reynolds Company were not taxable as income. The decision was based upon the earlier regulations, and the doctrine that reenactment of a revenue act in the face of an existing administrative interpretation imports legislative adoption of that construction. In deciding that the 1934 regulations could not be properly applied retroactively, however, the Court explicitly left open the question of the taxation of such transactions under the current law. It is arguable that the present Act, which is in terms the same as the earlier acts, means the same thing and that such transactions are not taxable. It is also arguable, of course, that the 1936 and 1938 Acts adopted the new administrative construction initiated in 1934 and provide that such transactions shall result in the realization of taxable income.

Although the 1934 and subsequent Acts have provided that "amounts received . . . upon the retirement of bonds, debentures, notes or certificates or other evidences of indebtedness . . . with interest coupons or in registered form, shall be considered as amounts received in exchange therefor"⁷⁸ and consequently, as resulting in capital gains or losses, the earlier revenue acts lacked this explicit definition. In *Fairbanks v. United States*⁷⁹ the question arose whether gains arising upon the redemption of bonds in 1926 and 1928 were gains from an exchange. The Court held that they were not; that the 1934 Act had not undertaken to construe the prior acts in this respect, but had purposely made a material addition.

*Davidson v. Commissioner*⁸⁰ involved an interesting situation, where the decision of the Court seems clearly correct, although there was some hardship on the taxpayer. A taxpayer directed his broker to sell certain stock and his bank to deliver the certificates for this stock to the broker. Due to an error on the part of the bank, however,

78. 48 STAT. 715, 26 U. S. C. A. § 101f (1934). The 1938 Act, 52 STAT. 502, 26 U. S. C. A. § 101f (Supp. 1938), contains a similar provision.

79. 306 U. S. 436 (1939).

80. 305 U. S. 44 (1938).

certificates for a different lot of stock were delivered to and sold by the broker. The taxpayer contended that his tax should be computed as though the stock, which he had ordered sold, had been sold. But, the Court held that taxable gain must be determined on the basis of the stock actually sold, rather than on the basis of what the taxpayer intended to sell.

(b) *Exclusions from Gross Income*

The federal income tax provides that property acquired by gift, bequest, devise or inheritance shall be excluded from the computation of gross income. In *Lyeth v. Hoey*⁸¹ the question arose as to whether property received by an heir under a compromise agreement in connection with the contest of a will, was received by "inheritance" within the exclusion of the federal statute. The Court held that this was a problem to be determined by federal law rather than the local law governing the will contest and that amounts received under these circumstances were properly excluded, regardless of whether or not the local law regarded them as passing by inheritance or in fulfillment of a contractual obligation.

(c) *Deductions*

Although it does not appear unreasonable to allow a taxpayer who is engaged in the business of buying and selling stock to deduct purchase commissions incurred in connection with the acquisition of stock as ordinary and necessary business expenses, this is precluded by the decision in *Helvering v. Winnmill*.⁸² The Supreme Court held that purchase commissions must be capitalized and added to the cost of the stock, rather than deducted as business expenses. The basis for this ruling was a long administrative construction to this effect, which the Court said had been adopted by Congress in subsequent re-enactments of the various revenue acts. The Court was not called upon to consider the proper treatment of selling commissions, which, in the case of a person engaged in the business of trading in stocks, might conceivably be treated either as a business expense or as an offset to the selling price. The present regulations allow the taxpayer his option of treating selling commissions in either fashion,⁸³ although some of the earlier regulations provided that such commissions must be dealt with as an offset to purchase price.⁸⁴

81. 305 U. S. 188 (1938).

82. 305 U. S. 79 (1938).

83. U. S. Treas. Reg. 101, Art. 242 (1939).

84. See, for example, U. S. Treas. Reg. 74, Art. 282 (1929), which provided in connection with the 1928 Act that, "commissions paid in selling securities are an offset against the selling price."

Under the current Act losses from complete liquidation of a corporation are treated as losses upon a sale or exchange, which are deductible as capital losses.⁸⁵ Although neither the 1928 nor the 1932 Acts were explicit upon this point, the Supreme Court in *White v. United States*⁸⁶ and *Helvering v. Chester N. Weaver Co.*⁸⁷ held that the intent of Congress under the earlier Acts was the same as that explicitly stated in the later laws, and that under those Acts, consequently, such losses were losses from sales or exchanges.

There has been an interesting difference of opinion among the lower federal courts with respect to the proper basis for computing a casualty loss of non-business property. Since a taxpayer is not allowed to deduct depreciation in connection with such property, it has been contended that the basis by which such a loss should be estimated is the original undepleted cost of the property. The Treasury on the other hand has consistently sought to restrict such losses to the fair market values of the property immediately before and after the casualty. In *Helvering v. Owens*⁸⁸ the Supreme Court sustained the position of the Treasury in connection with casualty losses of non-business property under the 1932 and 1934 Acts. Although both statutes provided that the basis for computing loss should be the adjusted basis, which would be used if the property were sold—which, of course, would be original undepleted cost—the Court said that this must be considered as an outside limitation, since the intent of the statute was to restrict the deduction to the actual loss sustained in the taxable year.

The fifteen per cent limitation upon the deduction of charitable contributions by an individual raises an interesting problem where a taxpayer has a net capital loss. In *United States v. Pleasants*,⁸⁹ for example, while the 1932 Act was in force, a taxpayer made charitable contributions which amounted to less than fifteen per cent of his net income for the taxable year, computed without reference to net capital loss. He had, however, in that year a net capital loss which exceeded his net income. The Court held that the charitable deductions were deductible and that the net capital loss should not be taken into consideration in computing the fifteen per cent limitation. Under the 1932 Act net capital losses were not deducted directly from ordinary income, but $12\frac{1}{2}$ per cent of the loss was subtracted from the tax computed on ordinary income without reference to the loss.⁹⁰ The Chief

85. 52 STAT. 502, 26 U. S. C. A. § 101f (Supp. 1938).

86. 305 U. S. 281 (1938).

87. 305 U. S. 293 (1938).

88. 305 U. S. 468 (1939).

89. 305 U. S. 357 (1939).

90. 47 STAT. 191 (1932).

Justice pointed out that the net income designated by the statutory limitation of fifteen per cent must be construed to mean ordinary income without deduction of net capital losses, in order to avert the injustice of taxing net income, on the one hand, and, on the other, treating it as non-existent for the purpose of allowing a deduction for charitable contributions. The Chief Justice also pointed out that the decision in the *Pleasants* case was not in conflict with *Helvering v. Bliss*,⁹¹ where it was held that capital gains are to be included in net income in determining the fifteen per cent limitation, since in that situation the gains are taxed as part of the taxpayer's net income. The fact that they are segregated and taxed at a special rate does not forbid their inclusion as a part of net income in determining the allowable deduction for charitable contributions.

It may be pertinent to point out in connection with *United States v. Pleasants* that there are different methods of dealing with capital gains and losses under the 1932 and 1938 Acts.⁹² Under the 1938 Act a specified percentage of long term gains and losses are directly added to or deducted from ordinary income. Consequently, the net income by which the limitation on charitable contributions is measured is ordinary income, plus the recognized percentage of long term gain, or less the recognized percentage of long term loss. The allowance for charitable contributions appears to be the same, moreover, when the tax is computed under the alternative basis specified in connection with long term gains and losses by the 1938 Act. Short term gains are taxed as ordinary income under the 1938 Act. As such they clearly must be considered as part of net income for the purpose of determining the limitation on charitable contributions. Short term losses, on the other hand, can only be deducted from short term gains under the 1938 Act. Since net short term losses are not deductible from net income they clearly cannot be invoked under the *Pleasants* case to reduce the allowable deduction for charitable contributions. It would appear, however, that to the extent that a carryover of short term losses is used to reduce net income of a subsequent year, this will limit the deduction of charitable contributions for that year.

Two final cases on deductions involved the same point. In *Helvering v. Metropolitan Edison Co.*⁹³ and *General Gas & Electric Corporation v. Commissioner*⁹⁴ the pertinent problem was whether a corporation which had taken over the assets and liabilities of a subsidiary, should be allowed to deduct unamortised discount and expense in con-

91. 293 U. S. 144 (1934).

92. 52 STAT. 500, 26 U. S. C. A. § 101 (Supp. 1938).

93. 306 U. S. 522 (1939).

94. 306 U. S. 530 (1939).

nection with the subsidiary's bonds upon the retirement of those securities prior to maturity. In allowing the deduction, the Court said that this was permissible, where there had been a true merger under which the identity of the corporation issuing the bonds continued through its successor, which became liable for its debts by operation of law; rather than a mere sale of assets accompanied by a contractual assumption of liability. Proceeding upon this premise, the Court examined the Pennsylvania law under which the consolidations had been effected and found the true mergers which permitted the deductions to be taken.

(d) *Administration*

Several cases involved administrative and procedural aspects of the income tax. In *McCrone v. United States*⁹⁵ there had been a contempt proceeding for failure to obey the order of a district court to testify before an Internal Revenue agent. The question was whether this was civil or criminal. The Court held that it was a civil proceeding and that an appeal from a decision in such a case must conform to the requirements for appeals from civil judgments.

*United States v. Bertelsen & Petersen Engineering Co.*⁹⁶ involved the jurisdiction of a district court to entertain a suit for refund against the United States. The Court held that the district court had jurisdiction where the refunds which were sought were for overpayments of taxes in excess of \$10,000 and the collectors to whom these overpayments had been made were either dead or out of office. The fact that the overpayments had been applied by the Commissioner to alleged deficiencies in other years did not change their character as overpayments to a collector, nor oust the jurisdiction of the district court to entertain suits for their refund.

*United States v. Continental National Bank & Trust Co.*⁹⁷ raised an interesting problem in connection with the statutory limitation on suits against the beneficiaries of a transferee's estate. On April 15, 1926, the defendants' testator was notified that the Commissioner intended to assess him for the amount of assets which he had received from a dissolved corporation in which he had been the principal stockholder, and which had failed to pay income and profits taxes for 1920. The corporation had been notified of the alleged deficiency in 1924, but had failed to petition for any redetermination. On June 11, 1926, the testator filed a petition with the Board of Tax Appeals. While this was pending, in March, 1929, he died. On January 27, 1931, the Board made an order of redetermination in the amount proposed by

95. 307 U. S. 61 (1939).

96. 306 U. S. 276 (1939).

97. 305 U. S. 398 (1939).

the Commissioner, which was followed on February 14, 1931, by a jeopardy assessment against the testator. Several months later the United States filed a claim with the administrator of the testator's estate. The administrator, however, ignored this claim and proceeded to distribute the estate to the defendants. On May 2, 1932, the United States commenced this action, alleging that the assets distributed to the defendants had been impressed with a trust for the payment of its claim against their testator. The defendants moved to dismiss the action on the ground that suit was barred by Sections 277, 278 and 280 of the Revenue Act of 1926, as amended by Section 311(b) of the Revenue Act of 1928. Over the dissent of Justices Stone and Black, the Court held that the action was barred by the statutory limitation and affirmed the judgment of the circuit court of appeals dismissing the suit. Mr. Justice Butler, who wrote the majority opinion, said that the action could not be sustained as a suit on account of the assessment against the corporation in 1924, since the time for such suit was limited by Section 278(d) to six years after the assessment was made. Nor could it be entertained as a suit against a transferee of the corporation's property, which was authorized without assessment. The time for bringing an action under Sections 270(a) and 280(b) (1) was six years after the corporate return was filed, which expired on May 16, 1927. The principal contention of the plaintiff was that the suit was timely because it was initiated within six years of the jeopardy assessment in 1931. The Government argued that this was a suit against the transferee of a taxpayer, which could be brought within six years of the assessment of the taxpayer under Sections 278 and 280, and that the jeopardy assessment was such an assessment. Mr. Justice Butler, however, had a double-barreled answer to this contention. In the first place, he said, the defendants were not transferees of a taxpayer, but merely beneficiaries of the estate of a transferee. Sections 278 and 280 were not broad enough to impose any liability upon them. Moreover, he added, the jeopardy assessment itself was not timely. The Government contended in this connection that the running of the statute had been suspended while the testator's appeal was pending before the Board of Tax Appeals. Adding this period to the six years allowed for assessment against him as a transferee, would have extended the period during which he could be assessed until October 25, 1932, roughly eight months after the jeopardy assessment was actually made. Mr. Justice Butler said, however, that this argument overlooked the death of the testator while the appeal was pending. Since upon his death no one moved to have a party appointed to continue the appeal and no motion was made to

dismiss it for lack of prosecution by a proper party, the suspension of the Commissioner's authority to make an assessment at most continued only for a reasonable time. That time had elapsed before the assessment was made.

VII

THE FEDERAL ESTATE TAX

One of the more perplexing aspects of the federal estate tax involves the retroactive taxation of inter vivos transfers. Thus, for example, if a joint tenant or a tenant by the entirety dies, the statute requires the inclusion of the common property in his gross estate, in proportion to the part of the consideration which he contributed to the acquisition of the property.⁹⁸ This is true even though the creation of the estate antedated any statute imposing such a tax.⁹⁹ The constitutionality of this provision has been upheld by the Supreme Court in the case of tenancies by the entirety.¹⁰⁰ In *United States v. Jacobs*¹⁰¹ the Court was faced with its constitutionality in connection with a joint tenancy. Two cases were disposed of in the same opinion. In one of them the decedent had purchased property in 1909—which, of course, considerably antedated the first federal estate tax of 1916—and had taken title in his name and that of his wife as joint tenants. He died when the 1924 Act was in force. The Court held that the entire value of the common property was taxable as part of his gross estate, on the theory that although the estate had been created prior to the taxing act, a taxable transfer took place upon the deceased tenant's death, and the tax was not, therefore, retroactive. The decision with respect to the decedent's half of the property was foreclosed by an earlier case.¹⁰² The real controversy centered about the surviving tenant's share. A joint tenant, unlike the tenant by the entirety, has a power of severance, so that for all practical purposes, except that he is unable to defeat his cotenant's right of survivorship by will, he is the full and complete owner of his part of the common property. It is exceedingly difficult honestly to say that there was any real transfer of the wife's share upon her husband's death in the circumstances revealed by *United States v. Jacobs*. The tax upon her interest looks like a tax upon property which had completely vested in her prior to the passage of any taxing statute. Mr. Justice Black, who wrote the majority opinion, obviously felt this difficulty, although he concluded

98. 44 STAT. 71 (1926).

99. *Ibid.*

100. *Tyler v. United States*, 281 U. S. 497 (1930); *Third National Bank of Springfield v. White*, 287 U. S. 577 (1932); *Helvering v. Bowers*, 303 U. S. 618 (1938).

101. 306 U. S. 363 (1939).

102. *Gwinn v. Commissioner*, 287 U. S. 224 (1932).

that the lapse of the husband's chance of succeeding to his wife's interest in the property by survivorship sufficiently changed the character of her interest in her share of the property to justify including it in the husband's gross estate. Stated baldly the position of the Court was that the fact that the wife could not defeat her husband's right of survivorship by her will, although she could easily have cut it off in other ways, justified taxing her interest in the property as part of his gross estate. Mr. Justice McReynolds wrote a dissenting opinion. Justices Butler and Roberts concurred in the dissent. Mr. Justice Stone did not participate in the decision.

The other case which was disposed of in the same opinion with the *Jacobs* case was *Dimock v. Corwin*,¹⁰³ which brings into still sharper focus the position of the majority. Prior to 1916 a husband gave property to his wife, which in turn she transferred to her husband and herself as joint tenants. The husband died after the passage of the 1926 Act. The majority of the Court held that the full value of the joint property was constitutionally taxable as part of his gross estate. The federal estate tax provides that property acquired by joint tenants shall be treated as the property of the tenant who originally owned it.¹⁰⁴ That is, if a husband gives property to his wife and she in turn creates a joint tenancy with him in respect of the property, this is treated as though he had conveyed the property directly to himself and his wife as joint tenants. The necessity for some such provision to prevent tax avoidance is obvious. But in this case there was no question of tax avoidance. The gift to the wife was made before there was any tax to avoid. The entire property had completely vested in the wife prior to the passage of any taxing act. By creating a joint tenancy of her own property at a time when there was no federal estate tax and no question of tax avoidance, the wife became subject to a tax passed years later not only with respect to the property which she had conveyed to her husband and recovered from him upon his death, but also upon the interest in the property which she had retained for herself.

These cases are a striking illustration of the unhappy situation which has developed in connection with retroactive death taxation. The problem here is relatively simple. Is the tax so unfair and oppressive that it violates due process? This is of course a matter of public convenience as well as individual inconvenience. Against the hardship of the taxpayer, the courts must balance the countervailing considerations of public policy. The retroactive taxes under the federal estate tax lead to a more equitable adjustment of the tax burden, because decedents dying at the same time are taxed in the same way. For example,

103. 306 U. S. 363 (1939), 87 U. OF PA. L. REV. 878.

104. 1926 Act § 302 (e), 44 STAT. 71 (1926), 26 U. S. C. A. § 411 (e) (1935).

if *A* created a joint estate in 1910 and *B* created a similar estate in 1938 and they both died in 1939, the joint property would be included in their gross estates in both cases. A retroactive tax might also possibly be justified, where this is necessary to reach people who have obviously been taking advantage of some oversight in an earlier law. Or, it might be justified on the broad ground that the sovereign needs money and that this is an inconvenience to which the subject must submit. These are rational approaches, consistent with the deference due an important constitutional guaranty. It cheapens due process, however, to approach the problem of retroactive taxation with the social outlook of a medieval conveyancer. No useful purpose is served by concealing the activating decisional factors in these cases beneath a layer of metaphysical distinctions, which will not mesh into any rational or consistent pattern, and would be largely irrelevant if they did.

Although the distinction between a tax on property and a tax on the privilege of passing property seems rather illusory, it certainly influences the way in which courts talk about death taxes, and probably affects the way in which they think about them too. Thus, for example, in *United States Trust Co. v. Helvering*¹⁰⁵ the Supreme Court held that a provision of the World War Veteran's Act of 1924, which provided that War Risk Insurance should "be exempt for all taxation" did not prevent the inclusion of such insurance in the gross estate of a decedent under the federal estate tax. Although it seems obvious that this may have frustrated the intention of Congress in granting the immunity, the Court reasoned that since the federal estate tax was a tax upon the privilege of succeeding to the insurance rather than a tax upon the insurance itself, it was not within the scope of the statutory exemption.

The provision in the federal estate tax taxing transfers in contemplation of death, although manifestly a necessary detriment to tax avoidance, continues to constitute an administrative bugbear. Despite the fact that this clause has been in the federal estate tax since its inception in 1916, the courts are still groping for a clear and workable definition of what it means. It is obvious, moreover, that judicial refinements of the definition of the phrase "contemplation of death" promise little real relief. The best that can be hoped for in this direction would be the clear formulation of a standard, which would still have to be applied to a constantly shifting factual background. *Colorado National Bank v. Commissioner*¹⁰⁶ is typical of the situation which confronts the Government in these cases. An elderly man made a will

105. 307 U. S. 57 (1939).

106. 305 U. S. 23 (1938).

leaving his property to his daughter and her children. Two years later when he was eighty years of age in order to provide more securely for his daughter and to guard her against his own business speculations, he created a trust of approximately one-third of his property. The terms of the trust provided that the income from the property should be accumulated during the grantor's life. At his death it was to be paid to his daughter and her children. When the grantor died, the Commissioner included this trust in his gross estate on the theory that it had been created in contemplation of death. The Board of Tax Appeals reversed the Commissioner and held that the transfer was not made in contemplation of death. The circuit court of appeals reversed the Board of Tax Appeals, and the Supreme Court, against the dissent of Mr. Justice Black, reversed the circuit court of appeals and restored the decision to the Board.

Better than twenty years' experience has demonstrated conclusively that the present provision for taxing gifts in contemplation of death is a constant source of litigation and administrative friction. It is an irritant to the taxpayer and a losing proposition for the government. The only sensible administrative solution for the problem seems to be a conclusive presumption of the type whose constitutionality was condemned in *Heiner v. Donnan*.¹⁰⁷ It is true that *Heiner v. Donnan* held that a conclusive presumption that gifts made within a certain period of death are in contemplation of death, was unconstitutional. Although *Heiner v. Donnan* has not been explicitly overruled, subsequent decisions have completely repudiated the reasoning upon which it rested.¹⁰⁸ It is completely out of line with the present temper of the Court. The problem is so pressing and *Heiner v. Donnan's* present position so dubious, that it would appear that Congress would be fully justified in attempting once more to solve this problem by a conclusive presumption.¹⁰⁹

CONCLUSION

It is difficult to appraise contemporary lawmaking fairly. Time is the genuine test of the quality of legal craftsmanship. Judicial in-

107. 285 U. S. 312 (1932).

108. *Helvering v. City Bank*, 296 U. S. 85 (1935); *Helvering v. Bullard*, 303 U. S. 297 (1938). See Lowndes, *A Day in the Supreme Court with the Federal Estate Tax* (1936) 22 VA. L. REV. 261, 265-267.

109. There were several other tax cases at the 1938 Term which have not been noted in the text. *Chesebro v. Los Angeles Flood Control District*, 306 U. S. 459 (1939), involved a special assessment. *Scher v. United States*, 305 U. S. 251 (1938) and *United States v. One 1936 Model Ford*, 307 U. S. 219 (1939) dealt respectively with search and seizure and the forfeiture of an automobile in connection with violations of the federal tax on distilled spirits. *Kohn v. Central Distributing Co.*, 306 U. S. 531 (1939) raised the question of the jurisdiction of a federal court to enjoin state taxes. *Bonet v. Yabucoa Sugar Co.*, 306 U. S. 505 (1939) held that the local courts had properly construed a Porto Rican statute to deny a refund for taxes voluntarily paid to the Territory.

novations must establish their title to respect by proving to be wise and workable in practice. Within these manifest limitations, however, a few observations about the tax work of the 1938 term as a whole are pertinent.

Although it is trite to refer continuously to the reconstructed personnel of the Court, this remains the magic key to the doctrinal deviations which have characterized the recent decisions. The ancient landmarks are passing, but they are passing according to a fairly perceptible and predictable philosophic pattern. The newcomers on the Supreme Court are what are commonly called liberal judges. There is certainly no more maltreated adjective in the political vocabulary of the day. In this connection, however, it has fairly definite connotations. Although the political parent of the new justices may be the New Deal, their juristic coloration is that of Holmes and Brandeis. It is not without significance that the two most recent appointees to the Court were outstanding law teachers. For generations Holmes and Brandeis have been the idols of the schoolmen. Following in the wake of their brilliant dissents, a body of professional opinion has been built up in radical opposition to the cast of thought best exemplified on the present Court by Justices McReynolds and Butler. The tax questions presented to the Supreme Court at the last term were not new problems. Nor were the answers. They were the answers of Holmes and Brandeis and Stone and Cardozo—the arguments found in the pages of the law reviews, and fervently propounded in the classrooms. The professorial influence, which was so prominent in the nascent days of the present administration, has penetrated even to the sacrosanct precincts of the Supreme Court.

In the field of jurisdiction to tax, for example, the recent repudiation of the decisions forbidding multiple taxation of intangibles¹¹⁰ is in the best tradition of the dissenting opinions of Holmes and Brandeis and Stone. The majority opinion in *O'Malley v. Woodrough*, which held that the salaries of federal judges were not immune from the federal income tax, is the minority opinion from *Evans v. Gore*.

The antagonism to the doctrine of intergovernmental immunities, which finds expression in *Graves v. New York ex rel. O'Keefe*, is orthodox judicial liberalism. So is the more elastic view of the federal taxing power, or if you choose, the commerce power of *Mulford v. Smith*. No one needs to be reminded of the academic agonies which followed *United States v. Butler*.

¹¹⁰. *Curry v. McCannless*, 307 U. S. 357 (1939); *Graves v. Elliott*, 307 U. S. 383 (1939); *Newark Fire Insurance Co. v. State Board of Tax Appeals*, 307 U. S. 313 (1939).

In dealing with doctrinal innovations it is important to maintain a temperate perspective. There is no intrinsic merit in innovation. Nor, at the other extreme, have ancient landmarks any validity except as they correctly define true boundaries. Taxation is the critical domestic problem of the day. It is a problem whose successful solution challenges the best of constructive statesmanship, unhampered by needlessly restraining constitutional inhibitions. The decisions at the last term were aimed at the removal of such restraints—restrictions on the national taxing power, on jurisdiction to tax, on taxing governmental employees and federal judges, on state taxation of interstate commerce. Constitutional development cannot safely mark time while life marches on. The recent decisions of the Supreme Court represent a natural political and juristic evolution. If they have come with stunning rapidity, this may be because their arrival was unduly delayed.¹¹¹

111. It may be well to bear in mind that the "ancient landmarks" have not been jettisoned irretrievably. They were after all merely man-made monuments. If time proves them indispensable, they can, and will be, resurrected in all their pristine elegance.